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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/523,130	08/24/2005	Walter Bernig	785-012074-US (PAR)	3497
27386 7590 09/16/2009 NORRIS, MCLAUGHLIN & MARCUS, P.A. 875 THIRD AVE 18TH FLOOR NEW YORK, NY 10022				
EXAMINER				
WOOD, ELLEN S				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
09/16/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/523,130

Applicant(s)

BERNIG ET AL

Examiner

ELLEN S. WOOD

Art Unit

1794

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED ~~18 August 2009~~ FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
see below.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Rena L. Dye/
Supervisory Patent Examiner, Art Unit 1794

The applicant claims that Ramesh discloses only using minor amounts of EVOH when blended for the oxygen barrier layer.

In response, Ramesh discloses that the nylon copolymer may be blended with another oxygen barrier resin such as ethylene vinyl alcohol copolymer (EVOH) in order to achieve a desired set of properties (col. 5 lines 3-5). Because EVOH loses much of its oxygen barrier properties with increasing relative humidity, the overall CO₂:O₂ transmission ratio during cure would not be greatly affected; but, the oxygen barrier during storage, when oxygen barrier properties become important, would be increased (col. 5 lines 6-10). That is, the addition of at least a minor portion of EVOH to a nylon copolymer-containing layer of the film of the present invention would serve to lower the oxygen transmission rate of the total film structure at low relative humidities (col. 5 lines 10-14). That is, the addition of at least a minor portion of EVOH to a nylon copolymer-containing layer of the film of the present invention would serve to lower the oxygen transmission rate of the total film structure at low relative humidities (col. 5 lines 10-14). In example 11, the amount of EVOH used was 10% (cols. 15-16). It clearly is shown that Ramesh discloses that the addition of EVOH does not greatly affected, thus the low oxygen transmission rate already being achieved by the resin is maintained at high humidities. Also, Ramesh does not recommend that only a minor portion be used in the blend. Ramesh discloses that at least a minor portion of EVOH be used in the blend, which mean that no less than a minor portion should be used. Thus, Ramesh does not teach away from using greater amounts of EVOH but actually encourages the use of EVOH because it allows the layer to have a stable oxygen barrier properties under high humidities but is advantageous under lower humidities because it lowers the transmission of oxygen.

The applicant argues that Edward does not using a greater amount of EVOH because there is a specific type of polyamide that has to be used for the layer.

In response, Edward discloses that when the core layer when used for a low CO₂ permeability application will generally have a greater amount of EVOH and a lesser amounts of nylon to produce a film having a low CO₂ gas transmitting rate, particularly when using an EVOH copolymer having an ethylene content of about 45 mol% [0055]. Under 35 U.S.C. 103 (a), the obviousness of an invention cannot be established by combining the teachings of the prior art references absent some teaching, suggestion, incentive, or predictability supporting the combination. *ACS Hospital Systems, Inc. v. Montefiore Hospital*, 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984); *KSR International Co. v. Teleflex Inc.*, 82 USPQ2d 1385, 1395-97 (2007). This does not mean that the cited prior art references must specifically suggest making the combination. *B.F. Goodrich Co. M Aircraft Braking Systems Corp.*, 72 F.3d 1577, 1582, 37 USPQ2d 1314, 1318 (Fed. Cir. 1996); *In re Nilssen*, 851 F.2d 1401, 1403, 7 USPQ2d 1500, 1502 (Fed. Cir. 1988)). A suggestion or motivation to combine references is an appropriate method for determining obviousness, however it is just one of a number of valid rationales for doing so. The test for obviousness is what the combined teachings of the prior art references would have suggested to those of ordinary skill in the art. *In re Young*, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991); *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). This test requires us to take into account not only the specific teachings of the prior art references, but also any inferences which one skilled in the art would reasonably be expected to draw therefrom. *In re Preda*, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968). It can be seen in Edward that the substituting the higher amounts of EVOH in the composition of Ramesh provides the obvious combination with the incentive to improve the CO₂ gas transmitting rate of the core layer. Thus, forming a film that has enhanced protection against high levels of CO₂ permeability.